LIM KIM SOO & ANOR.

v.

AUE KEAU

HIGH COURT MALAYA, KUANTAN
VC GEORGE J
[CIVIL APPEAL NO. 4 OF 1979]
11 MAY 1982

LANDLORD AND TENANT: *Tenancy Agreement - Option to renew - Termination of - Claim for re-possession and double rent on - Status and effect of registrable but non-registered tenancy - Effect of breaches by tenants on option to renew - Effect of tenants' holding over on termination on landlord's rights to re-possession and double rent.*

In 1971 the respondent (landlord) entered into a written tenancy agreement with the appellants (tenants) whereby the appellants were purported to be given the tenancy of the front left half of a shophouse for a period of 5 years. Rent was payable monthly. The tenants were to deliver up the premises at the end of the tenancy in as good state of repair as at the time of the agreement and they were not permitted to make any alterations to the premises without prior written consent of the landlord. If they wished to renew the lease for a further 5 years at the expiration of the tenancy and performed the stipulations and covenants to be observed up to the termination of the tenancy, according to Clause 9, the landlord undertook to grant the renewal. The landlord was given the right of re-entry and re-possession at any time on rent not being paid within the stipulated period or any of the tenants' stipulations not being performed.

The agreement was stamped but was not registered, though it purported to be lease for more than 3 years.

Very early in the tenancy, the landlord put up a partition separating the portion let out from the rest of the shophouse, which apparently cut off the ventilation to the portion let out to the tenants. The tenants installed a ventilator for which purpose they had to knock out a hole in a wall of the building. The tenants contended that it was done with the landlord's consent, but not in writing.

Apparently because of a dispute regarding the use of the toilet facilities, in the landlord's portion of the building, the tenants suspended payment of rent for two months, finally paying only on being given notice requiring the payments.

On the first term of the tenancy expiring by effluxion of time, the landlord informed the tenants by letter that a further term would not be granted and required vacant possession. By second letter, the landlord purporting to cancel the first letter, informed the tenants that they were monthly tenants, that one month's notice of termination was being given and that the landlord required delivery of vacant possession.

The husband of one of the tenants, who claimed to be the person involved in the agreement and the business testified that he had met the landlord about two months before the end of the tenancy regarding a renewal of tenancy but the landlord delayed giving an answer. A letter from the tenants' solicitor, dated a few days after the termination of the tenancy, touched on the matter of renewal stating that pursuant to Clause 9 of the agreement, the tenants had a right to occupy the premises for a further term of 5 years and that they intended to occupy the same.

The tenants refused to give up vacant possession and the landlord refused to accept rent. The landlord sued the tenants for vacant possession and double rent. The Magistrate who heard the case reduced the issues to.

(1) the status and effect of the agreement

(2) the effect of Clause 9

and in relation to that whether there were breaches of the terms and conditions of the agreement by the tenants. The Magistrate gave judgment for the landlord. The tenants appealed.

Held:

[1] On the claim for re-possession

(A) ***On the status and effect of the agreement***

(i) The Magistrate's conclusion that the agreement was void as a lease must be upheld. First the agreement was not registered as required by s. 206 of the National Land Code (the Code) and secondly it purported to grant a lease to two persons in contravention of s. 225(2) of the Code. [*Lee Lam Soh v. Low Ngah* [1973] 1 MLJ 97 applied].

(ii) The Magistrate's conclusion that the relationship between the parties in fact arose from a monthly tenancy of the premises was based on sound and established principles. A consideration of the evidence failed to reveal any equities that would have enabled the Court to give effect to the intention of the parties. What the tenants had was a monthly tenancy determinable on the giving of a full calendar month's notice which the landlord had effectively done.

(B) ***On the effect of Clause 9 and the alleged breaches***

Even if it was to be assumed that the tenants were entitled to a tenancy for a term of 5 years with an option to renew,

(a) the option was not exercised or

(b) in any event, if it had been so exercised, the landlord in the circumstances of the case was entitled to refuse to agree to the extension and had so refused.

(i) In the absence of an expert requirement that the option has to be exercised by communication it can be exercised by conduct. *[Gardiner v. Blaxill* (1960) 2 All ER 457 at 461)]. Such conduct on the part of the tenant must be unequivocal and should lead to the irresistible conclusion that the intention is to continue the tenancy for another term. But the tenants' conduct in the case of staying on and tendering the rent for another month could not be said to lead to that irresistible conclusion.

(ii) (a) The delay in tendering the rent for 2 months and even the making of the hole in the wall might be trivial but they amounted to breaches of the relevant covenant.

(b) A landlord's silence about breaches does not constitute a waiver of estoppel [*West Country Cleaners (Falmouth) Ltd. v Saly* [1966] 2 All ER] in which *Finch v. Underwood* [1876] 2 Ch. D 310 was considered and *Hare v. Nicoll* [1966] 1 All ER 285 and *Greenwood v. Martins Bank Ltd.* [1932] All ER 318 were applied]. In the instant case, the landlord had in fact placed on record her objections to both the breaches. The question of waiver or estoppel therefore did not arise. The landlord was estopped from questioning the right of the tenants for a further term of 5 years because he had allowed them to continue to occupy the premises after the end of the first term. It was not a case of the landlord determining the tenancy but the tenancy coming to an end by effluxion of time.

[2] On the claim by landlord for double rent

Under s. 28(4)(a) of the Civil Law Act 1956 (revised 1972), a tenant holding over after the determination of his tenancy is chargeable, at the option of the landlord, with double rent until possession is given up by him. Whether holding over is wilful or not is not relevant. Even if the tenants had stayed on the assumption that they had the right to do so, in all the circumstances of the case such an assumption did not appear to be reasonable. In any event, the claim for double rent was not put in issue in the Court below and as such could not be raised at the appellate level.

[Appeal dismissed with costs.]

Cases referred to:

Lee Lam Soh v. Low Ngoh [1973] 1 MLJ 97
Gardiner v. Blaxill [1960] 2 All ER 457
West Country Cleanes(Falmouth) Ltd. v. Saly [1966] 2 All ER
Finch v. Underwood [1876] 2 Ch D 310
Hare v. Nicoll [1966] 1 All ER 285
Greenwood v. Martins Bank Ltd. [1932] All ER 318

Legislation referred to:

Civil Law Act 1956 (revised 1972), s. 28(4)(a)
National Land Code Act 56/1965, ss. 206, 225(2)

For the appellants - Mahindar Singh
For the respondent - Peter Lai

(Digest Form Only)

Also found at [1982] CLJ 550